



Legal Update

February 2018

The Appeals Court holds that police officers reasonably conducted a pat-frisk of the defendant who was merely walking with another man who was the subject of an active arrest warrant for using a firearm during the commission of a violent felony.

Commonwealth v. William Ramirez, Mass. Appeals Court, No. 16-P-1580 (2018).

On March 25, 2015, shots were fired in Haverhill that struck and wounded a passerby. Haverhill police obtained an arrest warrant for Joshua Perez. On April 1, 2015, Detective Glenn Fogarty saw Perez, walking down the street with another man -- the Defendant. Detective Fogarty drove ahead of the two men, identified himself as a police officer, and said "Come here, I want to talk to you." Perez walked to the rear of Detective Fogarty's cruiser, but the Defendant walked away and adjusted his waistband as he did so. In Detective Fogarty's experience, the Defendant's gesture to his waist was consistent with someone concealing a firearm. Detective Fogarty ordered the Defendant to come back and he complied. Detective Fogarty conducted a pat-frisk of the Defendant, finding a knife and a firearm on his person.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

1st Issue: When was the Defendant stopped?

The Appeals Court held that Detective Fogarty seized the Defendant when he identified himself as a police officer and ordered him to stop. The police may talk and even ask questions of any person without requiring constitutional justification. *Commonwealth v. Barros*, 49 Mass. App. Ct. 613, 617-618 (2000), S.C., 435 Mass. 171 (2001). However, when there is a show of authority, the encounter becomes a seizure. Here, Detective Fogarty's announcement that he was a police officer and subsequent order: "**Come here, I want to talk to you,**" amounted to a seizure.

2nd Issue: Was Detective Fogarty justified in stopping the Defendant?

The Appeals Court determined that Detective Fogarty was justified in stopping the Defendant even though he was not engaged in suspicious criminal behavior before he was ordered to stop. The Appeals Court concluded that an officer may temporarily freeze a scene for the limited time reasonably necessary to safely execute an arrest warrant for a person accused of using a firearm in the commission of a violent felony. See *Commonwealth v. Wing Ng*, 420 Mass. 236, 237-240 (1995) (police can justifiably remove all other passengers from vehicle in which there is suspect subject to arrest warrant for violent felony).

The Appeals Court next examined whether the degree of intrusion was reasonable in the circumstances. The reasonableness of the stop requires balancing public interest against "the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). Here the intrusion on an individual's freedom for the brief period was reasonable for the police to take control of the scene and effectuate an arrest with "the special dangers encountered by an arresting officer" when executing an arrest warrant for a crime that gives rise to a reasonable fear for officer safety. *Commonwealth v. Skea*, 18 Mass. App. Ct. 685, 701 (1984).

Furthermore, the SJC previously ruled that the inherent volatility of executing a search warrant requires police to "exercise unquestioned command" of the scene. *Commonwealth v. Charros*, 443 Mass. 752, 763 (2005). In *Charros*, the SJC reasoned that the "authority to detain these persons is incidental to, and exists contemporaneously with, the execution of the warrant" and "arises from necessity, that is, from the need to control the inherent volatility produced by the search environment." There are three important interests served by allowing police to briefly detain occupants of a residence during the execution of search warrant: officer safety; facilitating the completion of the search; and preventing flight. Here, Detective Fogarty's detention of the Defendant was both reasonable and necessary for officer and public safety.

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3rd Issue: Was the frisk of the Defendant justified?

The Appeals Court applied the rule that “to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is **armed and dangerous**,”

Commonwealth v. Martin, 457 Mass. 14, 19 (2010), which includes suspecting that the person is illegally armed. See *Commonwealth v. Resende*, 474 Mass. 455, 461 (2016) (police realization that suspect carried illegal firearm justified subsequent stop and frisk). Here, the Defendant was in the company of an individual believed to have recently possessed a firearm in the commission of a violent felony, see *Commonwealth v. Monteiro*, 71 Mass. App. Ct. 477, 479 (2008) (suspicious movement and communicating with a man “known to the police for gun-related incidents” supports reasonable suspicion); he defied a valid police order to stop, *id.* at 480 (flight after valid stop heightens reasonable suspicion); and he tugged at his waistband while walking away, see *Commonwealth v. Sykes*, 449 Mass. 308, 314-315 (2007) (observing suspect “clenching his waistband” supports reasonable suspicion that he is carrying a firearm). The combination of these factors gave rise to a particularized reasonable articulable basis to believe that the Defendant was illegally armed. See *Commonwealth v. Colon*, 87 Mass. App. Ct. 398, 402 (2015) (“collective factors established reasonable suspicion of unlawful possession of a firearm”).

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